Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2018	))	MD Docket No. 18-175

JOINT REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION AND THE AMERICAN CABLE ASSOCIATION

NCTA – The Internet & Television Association ("NCTA") and the American Cable Association ("ACA") submit these reply comments in response to the comments submitted on the Commission's Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[1/] The arguments raised by the Direct Broadcast Satellite ("DBS") multichannel video programming distributors ("MVPDs") regarding the assessment and collection of fiscal year ("FY") 2018 regulatory fees for DBS services misstate prior Commission orders and have been repeatedly rejected by the Commission. It is long past time for DBS operators to share equally in Media Bureau regulatory fees.

The DBS operators argue that "the Commission has failed to explain how regulatory developments in the last year have caused the Media Bureau to allocate additional FTEs to handle DBS matters consistent with the fee increase proposed for FY 2018 while simultaneously causing the Media Bureau to allocate significantly fewer FTEs to handle cable matters."[2/] This argument presupposes that the DBS regulatory fee for FY 2017 reflected the Commission's determination of the level of DBS participation in Media Bureau activities for the year, and as

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1/ *Assessment and Collection of Regulatory Fees for Fiscal Year 2018*, Report and Order and Notice of Proposed Rulemaking, MD Docket No. 18-175, FCC 18-65 (rel. May 22, 2018) ("*FY 2018 NPRM*").

2/ Comments of DISH Network L.L.C. and AT&T Services, Inc., MD Docket No. 18-175, at 3-4. (filed June 21, 2018) ("DISH/AT&T Comments").

such, the Commission must now justify any increase from that amount by showing a change in the level of DBS participation.[3/] This argument mischaracterizes the Commission's stated rationale for determining the DBS regulatory fee each year and the law governing increases in regulatory fees.

First, not only has the Commission <u>not</u> suggested in the past that the DBS regulatory fee represents a full assessment of DBS Media Bureau participation, it has explicitly said that the fee represents an attempt by the Commission to phase in the fee slowly, due to DBS operators' new inclusion in the cable/IPTV category and DBS operators' arguments about rate shock.

As ACA pointed out in its comments, the Commission has always been clear about its intention to bring the regulatory fees for DBS and cable/IPTV to parity.[4/]

In 2015, when the Commission first established the Media Bureau-based regulatory fee for DBS, it acknowledged that AT&T and DISH had evolved into large MVPDs and that "there was no reasonable basis to continue to exclude DBS providers from sharing in the cost of MVPD oversight and regulation with cable television and IPTV."[5/] Having determined that, the Commission decided that "[i]n lieu of directly including DBS providers in the cable television/IPTV category at the same regulatory fee rate, [it would] *phase in* the new Media Bureau-based regulatory fee."[6/] The Commission further stated that it was adopting the phase-in

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3/ DISH/AT&T Comments at 1, 3, 5.

4/ ACA Comments, MD Docket No. 18-175, at 2-3 (filed June 21, 2018).

5/ *Assessment and Collection of Regulatory Fees for Fiscal Year 2017*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 7057, ¶¶ 18-19 (2017) ("*FY 2017 Report and Order*") (discussing the Commission proposal in the 2015 NPRM (*Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, MD Docket No. 15-21, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd. 5354, ¶ 38 (2015) ("*FY 2015 NPRM*").

6/ *FY 2017 Report and Order* ¶ 19 (emphasis added) (explaining the Commission's 2015 decision to phase in the Media Bureau-based fee for DBS).

approach to "avoid sudden and large changes in the amount of fees," which would address the DBS operators' concerns regarding the impact that the fee would have on their customers.[7/]

In 2016, the Commission reaffirmed its intent to continue phasing in DBS regulatory fees, noting that it had stated in 2015 that it "would update the rate as necessary to ensure an appropriate level of regulatory party."[8/] And again in 2017, the Commission increased DBS regulatory fees, reiterating that, under the phase-in approach, it "has increased the DBS regulatory fee each year, to bring it closer to the per-subscriber rate paid by cable television and IPTV."[9/] There is therefore no basis for the DBS operators' claim that last year's fee marked the end of the phase-in period and was somehow meant to represent an assessment of "the appropriate fee to assess to cover the burden imposed" by DBS participation in Media Bureau rulemakings.[10/]

Second, as both NCTA and ACA explained in their initial comments and the Commission has held in the past, the Commission does not need to justify regulatory fees based on a regulatee's level of participation in Commission proceedings from year to year.[11/] Moreover,

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7/ *FY 2015 NPRM* ¶ 38.

8/ *Assessment and Collection of Regulatory Fees for Fiscal Year 2016*, Report and Order, 31 FCC Rcd. 10339, ¶ 25 (2016) ("*FY 2016 Report and Order*") (describing the Commission's decision in *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, MD Docket No. 15-21, Report and Order and Further Notice of Proposed Rulemaking, 30 FCC Rcd. 10268, ¶ 20 (2015) ("*FY 2015 Report and Order*")).

9/ *FY 2017 Report and Order* ¶ 19.

10/ DISH/AT&T Comments at 5.

11/ NCTA Comments, MD Docket No. 18-175, at 4-5 (filed June 21, 2018) (explaining that "activity levels and participation in specific proceedings may change from year to year" making it difficult to assess regulatory fees based on participation in particular proceedings); ACA Comments at 3.

neither the Communications Act nor the Commission's rules requires an increase in regulation or oversight to justify an adjustment to regulatory fees.[12/]

In fact, just last year, the Commission reiterated that DBS regulatory fee increases are not due to some direct correlation to DBS operators' participation in any particular proceeding or the number of proceedings in which they participated, but rather are based on the number of Media Bureau full-time employees ("FTEs") that work on MVPD issues, which includes DBS.[13/] In any event, AT&T and DISH's attempts to downplay their participation in Media Bureau proceedings are simply baseless.[14/] As NCTA and ACA detailed, the DBS operators today are major players in many Media Bureau activities.[15/]

Third, the Commission has already considered and rejected DISH and AT&T's argument that DBS is not identical to cable and therefore cannot be charged at the same rate as cable/IPTV providers.[16/] The Commission has frequently grouped similar providers together for regulatory fee purposes, even though they may use different technologies as delivery methods and are not

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12/ *See FY 2015 NPRM* ¶ 32 (describing permitted amendments to regulatory fees pursuant to 47 C.F.R. §159(b)(3)).

13/ *FY 2017 Report and Order* ¶ 22 ("This regulatory fee is not based on specific recent proceedings, but that a significant number of Media Bureau FTEs work on MVPD issues that include DBS. . .The fee increase we adopt today is not based on particular Media Bureau proceedings, but is an effort to bring the regulatory fee closer to the cable television/IPTV per subscriber fee."); *see also Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-140, ¶19 (2007) ("*FY 2007 Report and Order*") (making clear "that the regulatory fee assessments are based on the burdens imposed on the Commission.").

14/ DISH/AT&T Comments, at 1, 3 (arguing that the proposed rate increase "cannot be justified based on Media Bureau resources devoted to DBS providers and DBS providers' participation in Media Bureau proceedings").

15/ NCTA Comments at 6 (discussing the DBS providers' active participation in Media Bureau proceedings in the past year); ACA Comments at 3-4 (describing the Media Bureau proceedings specific to DBS).

16/ DISH/AT&T Comments at 7.

regulated identically,[17] and has specifically held that DBS belongs in the cable/IPTV category even though DBS is not identical to cable television and IPTV from a technological or regulatory perspective.[18] Similarly, DBS operators' arguments that the "sheer number of cable operators versus DBS providers" warrants a different regulatory fee are irrelevant.[19]

Finally, the Commission should reject AT&T and DISH's tired arguments that the proposed fees will cause rate shock and their avowed concern about subscriber expectations going forward.[20] As in past years, these claims are untenable. The proposed fee increase

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17/ *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2013,* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 7790, ¶¶ 32-33 (2013) ("*FY 2013 NPRM*") (assessing IPTV providers identical regulatory fees as cable operators, although cable television and IPTV services are technologically different and not regulated identically); *FY 2007 Report and Order* ¶ 20 (including VoIP service providers in the same rate category as interstate telecommunications service providers despite large differences in regulatory burdens).

18/ *FY 2017 Report and Order* ¶ 24 ("We recognize that DBS is not identical to cable television and IPTV. Services that are not technologically identical nevertheless warrant placement in the same regulatory fee category, e.g., ITSP includes a range of carriers that may not be regulated identically but must pay fees on the same basis.").

19/ DISH/AT&T Comments at 8-9. The DBS operators' complaint essentially boils down to dissatisfaction with the Commission's longstanding approach toward assessing regulatory fees by grouping regulatees into broad service categories and assessing fees on individual entities based on their relative size (for example, by basing MVPD fees on a per-subscriber basis, or by assessing interstate telecommunications provider fees according to revenue). As this proceeding is not intended to serve as a review of the Commission's broader framework for establishing regulatory fees, these concerns should be dismissed.

20/ DISH/AT&T Comments at 9. The DBS operators have been crying "rate shock" in response to the regulatory fees for years. *See, e.g.*, Further Reply Comments of DIRECTV and DISH at 11, MD Docket No. 14-92 (Dec. 26, 2014) (arguing that an fee increase will cause rate shock); Letter from Allison A. Minea, Director and Senior Legal Counsel, Regulatory Affairs, DISH to Marlene H. Dortch, Secretary, FCC (Dec. 16, 2016) (citing *FY 2013 NPRM* ¶ 21) (arguing that should the Commission move forward with increasing fees, it should ensure that it avoids rate shock by not imposing a fee that leaves DBS providers or their subscribers "vulnerable to the sudden and large changes in the amount of fees paid by regulatees"); Reply Comments of DISH at 2, 4 MD Docket No. 16-166 (July 5, 2016) (arguing that an increase in regulatory fees for FY 2016 would cause rate shock and agreeing with DIRECTV that a one cent per subscriber per month fee would cause its subscribers rate shock); Comments of DISH at 6-8, MD Docket No. 16-166 (June 20, 2016). Yet they have produced no evidence that the regulatory fee increases have had any impact on their subscriber retention efforts. Moreover, if the increase of a less than a penny per month can have the adverse subscriber reaction that the DBS operators allege, it is even more important to establish fees that promote competitive parity since their cable competitors are subject to even higher fees.

amounts to less than a penny per month for subscribers, and results in a fee still well below what DBS competitors have to pay, at a time when DBS providers regularly increase their rates by many dollars per month.[21/] As to preparing their subscribers for the future, DBS providers have had more than enough notice that their regulatory fees will increase by a few pennies each year and could have been setting subscriber expectations accordingly if they believed that would be a concern.

[21/] *See* NCTA Comments at 5; *see also FY 2016 Report and Order* ¶ 29 (rejecting DISH's argument that the proposed fee increase would cause "rate shock" at a time when a DBS subscription cost a subscriber, on average, $1200 per year); *FY 2017 Report and Order* ¶ 20 (rejecting DISH and AT&T's claims of harm from a regulatory fee increase because an increase of a few cents per subscriber per month "*is a negligible fraction of a monthly bill*") (emphasis added).

CONCLUSION

The DBS operators' arguments miss the mark. Their arguments against regulatory fees for Media Bureau oversight and regulation have been previously considered and rejected by the Commission and should again be rejected. NCTA and ACA applaud the Commission's proposal to raise the DBS regulatory fee, but reiterate that the Commission should recognize that the time has come to set the regulatory fees for DBS operators at the same rate assessed other MVPDs.

Respectfully submitted,

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